

Key Takeaways...

from Baker McKenzie's Future of Disputes spotlight session

1. Themes in state intervention: the "not-so-new" normal

State intervention is an increasingly significant topic for businesses. Political transformation in recent years has resulted in an increase in governmental activity in the private sector, a trend that we have only seen amplified by the COVID-19 pandemic. Citing various public interest grounds, such as national security or public health, governments are increasingly comfortable taking measures that would previously have been considered to be an unwarranted and unacceptable intervention in private markets. During the pandemic, governments around the world acted quickly to introduce measures such as:

- export controls on PPE
- direct awards of highly lucrative public contracts without formal procurement processes
- additional restrictions on foreign investment

All of this was done in addition to the introduction of a wide range of measures, such as job retention schemes and business support initiatives.

For this session, we were joined by David Chmiel, managing director at Global Torchlight, who set the scene in a keynote speech about the increase of government intervention on the global stage. He was quick to point out that governments began showing a much greater propensity to indulge in economic nationalism even before the COVID-19 pandemic. He also noted that this trend is set to continue for the foreseeable future, with nations increasingly viewing each other as strategic competitors and thereby conflating economic interests with the concept of national security.

David averred that the tools used to effect state intervention are often legal in nature or form, thereby placing lawyers at a critical nexus. As such, lawyers are increasingly expected to have both legal and political antennae to manage challenges presented by this "not-so-new" normal.

2. Case study: the misadventures of Goodheart and its Chinese investor

During this session, we explored the elements of an effective response to state intervention measures through the means of a fictional case study involving Goodheart, a fictitious UK company, and its Chinese investor, Guangzhou Health Investment Co (GHI). The scenario followed Goodheart's endeavours to secure a large NHS contract for the supply of medical devices. The company's efforts were blocked by a series of adverse statements and decisions made by the UK Government, which was unwelcoming of GHI's involvement in the UK healthcare sector.

In discussing the scenario, we highlighted the importance of **three key pillars** to an effective response to state intervention, namely:

1. establishing an effective response team to create an aligned legal, public and government relations strategy
2. exploring legal options at national level
3. considering redress at the international level for foreign investors.

The response team

An essential first step is to assemble a central response team, consisting of senior members of the:

- legal team – tasked with considering legal options, such as claims against the UK Government both at the national and international level
- media/public relations/government relations teams – tasked with monitoring media coverage, preparing press releases and providing comments to the press
- commercial team – on hand to make quick decisions and provide the business' perspective on both legal and non-legal advocacy.

It is essential that the response team works “hand in glove” to advance an aligned response strategy on all fronts. Setting up a team as early as possible will increase the chances of successfully navigating initial interactions with: (i) governmental entities to reach resolution without the need for legal action; and (ii) other stakeholders to manage reputational risk.

Options at national level

Options at national level will of course vary depending on the particular form of state intervention.

In our session, we considered Goodheart’s rights to challenge an adverse decision by the UK Government to: (i) cancel the procurement for the medical device contract in which Goodheart was participating; and (ii) award a similar contract to another company without competition on urgent public health grounds. In the public procurement context, Goodheart’s rights to mount a legal challenge would be subject to tight deadlines, so it would need to act fast. However, the company should first attempt to establish contact with the relevant NHS procurement hub to understand what happened, whilst also assessing the merits of its potential claim.

In our fictitious scenario, Goodheart was also facing the prospect of giving evidence in a public inquiry, due to consider the UK’s response to the COVID-19 pandemic and its preparedness for a future pandemic. We discussed practical tips for preparing to participate in an inquiry, such as:

- preserving relevant information and evidence
- developing Goodheart’s narrative, which needs to be accurate and consistent with existing public statements as well as documentary evidence
- deciding who is the best person to give oral evidence and the importance of thorough preparation for giving evidence; identifying Goodheart’s commercial objectives and considering whether any other entities might voice the same concerns.

While participation in a public inquiry process is often viewed by businesses in a negative light, it can also potentially provide an opportunity to raise awareness of certain issues and advance elements of a company’s commercial agenda.

Recourse at international level for foreign investors

In the context of a state intervention response, it is often overlooked that foreign investors may also have recourse against a government for breach of their own, separate rights under a bilateral investment treaty (BIT). By way of example in the Goodheart scenario, GHI may be able to bring a claim in its own right as an existing minority shareholder in Goodheart by virtue of the **UK-PRC BIT**. However, it is not always the case that a foreign investor will be protected by a BIT. There are important limitations to note:

- While there are now over 2,000 bilateral and multilateral investment treaties in force between states which grant protection to investors, coverage is by no means absolute. It is also important to check whether there is a BIT in place which might grant protection to an investor of a particular nationality who made an investment in a particular jurisdiction
- In each case, it is necessary to check the requirements for an investor to have standing to bring a claim. BITs usually only grant rights to “investors” (usually companies incorporated in a particular jurisdiction) who have made an “investment” in the host state (such as the acquisition of shares). However, this may be subject to additional restrictions
- The scope of substantive protections also varies. BITs will usually protect an investor from unfair treatment and expropriation, but it is important to check the scope of protections that you might enjoy as a foreign investor.

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